EXHIBIT 8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CITYSCAPE CORP.,

Plaintiff,

v. 98 Civ. 223 (SHS)

WALSH SECURITIES,

Defendant.

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New York, N.Y.
June 8, 2000
4:10 p.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

APPEARANCES

GIBSON DUNN CRUTCHER, LLP
Attorneys for Plaintiff
BY: LESLIE E. MOORE

ST. JOHN & WAYNE, LLC
Attorneys for Defendant
BY: ROBYN M. GNUDI

(In open court)

THE DEPUTY CLERK: Cityscape Corp. v. Walsh Securities, 98 Cr. 223.

Counsel, state your names for the record.

MS. MOORE: Leslie Moore from Gibson Dunn & Crutcher. I have with me my colleague Lynn Brady. She is not admitted to this court. She is admitted to the New York Supreme. I ask your Honor's permission to let her join me at the table.

THE COURT: Of course.

MS. GNUDI: Robyn Gnudi from the firm of St. John & Wayne for the defendant Walsh Securities.

THE COURT: Good afternoon.

I am going to read a decision on the pending motion.

There is discussion in the motions of 40 loans, but my notes indicate that on the appraisal variance loans, because there were originally 108 and 69 of them dropped out after my earlier decision that that left 39, and you keep on talking about 40. There is a loan that I think has been paid off. Is that the 40th loan?

MS. MOORE: Yes, your Honor.

THE COURT: That is what I thought. So I will talk then about the 39 loans that are left on the appraisal variation loans. We all understand what I am referring to. One has been paid off. There is no issue.

MS. GNUDI: Yes.

MS. MOORE: Yes, your Honor.

THE COURT: The following is my determination on the pending motions:

On June 30, 1996, Walsh Securities, Inc. and Cityscape Corp. entered into a master agreement for sale and purchases of mortgages. We'll call that the agreement. Thereafter, by letter dated July 30, 1996, Walsh and Cityscape partially amended the terms of the agreement in a commitment letter, which we will call the letter agreement. Pursuant to those agreements, Walsh sold and Cityscape purchased seven pools of residential home mortgage loans for approximately $128 million, the last pool being funded on August 23, 1996.

The loans upon which Cityscape is now suing at this point fall into two groups. When I say "this point," I am talking about after my decision of last year. Actually, I think it was late '98.

The first group are 39 loans that Cityscape alleges had significantly inflated property appraisals. Those are the appraisal variance loans. The second group is 32 loans that were part of a fraudulent land-flipping scheme. We will call those the New Jersey loans.

Section 5 of the agreement contains numerous representations and warranties relating to each loan. Pursuant to Section 6 of the agreement, Cityscape had the right to request that Walsh repurchase the relevant loans if

the representations and warranties were breached. Cityscape has alleged that certain representations and warranties were breached with respect to both the appraisal variance loans and the New Jersey loans, and that Walsh's refusal to meet Cityscape's repurchase demand was in breach of Walsh's contractual obligation pursuant to Section 6 of the agreement.

Walsh has now moved for summary judgment pursuant to Rule 56 on the grounds that Walsh was not under a contractual obligation to repurchase either set of loans. Cityscape has cross-moved for partial summary judgment on the New Jersey loans only.

By decision, dated December 23, 1998, I denied Walsh's motion in part and granted it in part, ordering the dismissal of Cityscape's claim on 69 appraisal variance loans. Again, those are not the loans we are talking about today because those loans were out of the case as of December 23, 1998.

At that time, Cityscape's motion for partial summary judgment on 32 New Jersey loans was denied. Now that discovery is complete, the parties have again moved for summary judgment. You are all familiar with the standard for summary judgment, which may be granted "only when the moving party demonstrates that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" That is *Allen v. Coughlin*, 64

F.3d 77, 79, (2d Cir. 1995).

I must "view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor, and may grant summary judgment only when 'no reasonable trier of fact could find in favor of the nonmoving party.'" That is *Allen*, 64 F.3d at 79.

Now I will deal first with the appraisal variance loans.

Pursuant to Sections V(27) and VI(G) of the agreement, as amended by the letter agreement, Cityscape is entitled to request repurchase of any loan for which a reappraisal varies by more than 10 percent from the original appraisal. Cityscape alleges that reappraisals of the real properties securing the 39 loans at issue here show a variance in excess of 10 percent. Cityscape argues that pursuant to Section VI(G), Walsh was contractually obligated to repurchase those 39 loans. Walsh argues that its contractual obligation to repurchase those appraisal variance loans was discharged by Cityscape's failure to fulfill two of its obligations under the agreement and the letter agreement: (1) to notify Walsh of the reappraisal variance and repurchase request within 120 days, and (2), to provide reappraisals dated as of the date of the original appraisal. Walsh has moved for summary judgment on these bases.

First we will take the 120-day provision. The letter

agreement amened Section VI(G) of the agreement to require that Cityscape notify Walsh of any appraisal variance repurchase request "within 120 days of the date which the buyer delivers the funding price proceeds to the seller." The buyer is Cityscape and the seller is Walsh.

The letter agreement explicitly states that if Cityscape fails to comply with this condition, then the "provisions respecting appraisal variances shall be waived." The parties agree that Cityscape failed to comply with the 120-day provision, since the request for Walsh to repurchase was made by Cityscape approximately one year after proceeds were delivered to Walsh. Walsh argues that Cityscape's uncontested failure to comply with this provision discharged Walsh's obligation to repurchase the appraisal variance loans. Cityscape argues that Walsh waived the 120-day provision and that, moreover, the 120-day provision in the letter agreement does not apply retroactively to loans purchased before the letter agreement was executed (which includes 23 of the loans at issue).

Unless otherwise noted, the following facts are undisputed: The parties agree that on August 22, 1997 Cityscape sent a letter to Walsh demanding that Walsh repurchase 39 of the loans, allegedly because of appraisal variances exceeding 10 percent. On August 25, '97, Steven Korn of Cityscape spoke to Arnold Cohn of Walsh. During that

conversation, Mr. Cohn of Walsh confirmed that he had received Cityscape's demand letter and requested that Cityscape provide Walsh with the reappraisals for each property. On August 29, 1997, Mr. Korn of Cityscape sent 38 of the 39 reappraisals to Walsh and on September 10 of that year he sent the final reappraisal.

Defendant argues that when Mr. Cohn received these demands, he forwarded them to the quality control and legal departments at Walsh. Mr. Cohn testified that when he received the demand he was unaware of the existence of the 120-day provision or even of the existence of the letter agreement, and that when he learned of this provision in or shortly after late August, he had ceased working on the request. That is Cohn's deposition, 103/24 to 107/21. Mr. Cohn also testified that around this time he informed Cheryl Carl at Cityscape that he had ceased working on the request. That is the Cohn deposition, 103 to 107. Ms. Carl testified that she did remember learning from Mr. Cohn that Walsh had ceased working on the requests due to the 120-day provision, but testified that she could not recall when they had this conversation. That is the Moore Aff., Exh. 24, at 277:8 to 279:8. According to Cityscape, as late as September 27, 1997, Mr. Cohn asked Mr. Korn to order third-review appraisals at Walsh's expense. Moore Aff., Exh.17. Pursuant to VI(G) of the agreement, Walsh was entitled to order

third-review appraisals at its own expense upon receiving a repurchase request from Cityscape. Moreover, Cityscape also alleges that from June through mid-September 1997, Cityscape and Walsh were negotiating the repurchase the Vaughn loan, an appraisal variance loan, for which Cityscape had also failed to comply with the 120-day provision. Moore Aff., Exh. 5.

In the first decision, and that is in my December 1998 decision, I found that there were triable issues of fact as to whether defendant had waived the 120-day provision and as to whether the 120-day provision applied to loans purchased prior to the execution of the letter agreement. The question on this motion is whether the evidence developed in discovery permits the finder of fact to conclude that Walsh intentionally waived this provision. There is no such evidence in this record.

In order to establish a waiver under New York law plaintiff must show that the party charged with the waiver relinquished the right in question with both "knowledge of the existence of the right and an intent to relinquish it." *Christian Dior-New York v. Kort, Inc.*, 792 F.2d 34, 40 (2d Cir. 1986). In order to establish an intentional waiver, plaintiff must show a "clear manifestation of intent by defendant to relinquish the protection of the contractual limitations period." See *Gilbert Frank Corp. v. Federal Ins. Corp.*, 70 N.Y.2d 966, 968, 525 N.Y.S.2d 793, 520 N.E.2d 512,

514 (N.Y. 1988).

In *Gilbert*, the defendant insurance company had four meetings with the plaintiffs, numerous telephone conversations, and eventually made an offer to settle, all after the limitations period had expired. See id. In that case, the court found that those factual allegations were insufficient to support the plaintiff's contention that there was a triable issue of fact regarding defendant's intent to waive the limitations period. That is *Gilbert* and *Arkin-Medo Corp. v. St. Paul Fire and Marine Ins. Co.*, 585 F.Supp. 11 (E.D.N.Y. 1982), aff'd, 742 1430 (2d Cir. 1983); as well as *Fox-Knapp, Inc. v. Employers Mutual Insurance, Co.*, 725 F.Supp. 706, 710-11 (S.D.N.Y. 1989), aff'd, 893 F.2d 14 (2d Cir. 1989).

Like the allegations in *Gilbert*, the allegations in this case are not substantial enough to survive summary judgment on this issue. Even reading all the allegations in the light most favorable to the nonmoving party, the only relevant evidence presented by plaintiff is Cohn's September 24, 1997 request for third review appraisals. Plaintiff argues that Cohn initiated this contact subsequent to learning of the 120-day provision and that it is probative of Walsh's intent to waive this provision. However, this allegation is no more probative of a waiver than the allegations in *Gilbert*; rather in both cases plaintiff seeks to premise its waiver

argument on post limitations contact which never clearly evince an intent to waive the provision in question. In both cases, the evidence is simply not indicative of intent to waive this provision. Accordingly, Korn's testimony that Cohn contacted him to order third review appraisals on September 24, 1997 is insufficient to raise a triable issue of fact. Likewise the evidence that defendant was willing to negotiate the Vaughn loan speaks only to the defendant's possible intent to ignore the provision with regard to that particular loan.

Plaintiff is correct that the Second Circuit has indicated that summary judgment in the context of intentional waiver claims is not always appropriate, given that intent is often the critical issue. I cite *Christian Dior-New York v. Koret Inc.*, 792 F.2d 34, 40 (2d Cir. 1986); *Voest-Alpine International Corp. v. Chase Manhattan Bank*, 707 F.2d 680, 685 (2d Cir. 1983). However, in both of those cases the plaintiffs only survived summary judgment because the allegations regarding defendant's waiver did constitute evidence of a "clear manifestation of intent" to waive the relevant provision. See *Gilbert*, 70 N.Y.2d, at 968, 525 N.Y.S.2d at 795, 520 N.E.2d at 514. In *Christian Dior*, plaintiff alleged that defendant had orally promised to not enforce the relevant contractual provision, despite a no oral modification clause in the contract. See 792 F.2d at 39. The Court of Appeals held that there was a triable issue of fact

regarding whether or not the "no oral modification clause" had been waived. See *Christian Dior* at 40. The allegation that the defendant had orally promised not to enforce the contractual provision is evidence of a possible intent to waive the no oral modification provision. Similarly, in *Voest*, the Second Circuit held that summary judgment was inappropriate on the issue of waiver where plaintiffs sought to prove intention through "declaration, acts and nonfeasance which permit different inferences to be drawn." That is *Voest* at 685. However, the evidence presented by plaintiff in *Voest* to establish a waiver was substantially more compelling than that presented here. In *Voest* the plaintiff presented evidence of an initialed approval of the relevant documents by a defendant official, as well as a letter allegedly co-authored by plaintiff and defendant indicating that the documents in question had been accepted. That is *Voest*, 684. The plaintiff in *Voest* presented evidence that the defendant in that case had accepted the defective performance.

Here, however, Cityscape has presented no evidence that Walsh ever manifested a clear intent to waive the 120-day provision or that Cityscape's reappraisals were accepted or approved by Walsh at any point. Therefore, I am granting summary judgment in defendant's favor regarding the 120-day provision.

While this issue would otherwise entirely resolve the

question of the appraisal variance loans, Cityscape argues that the 120-day provision did not apply to the 23 appraisal variance loans sold in June of 1996, because it was added to the agreement by the letter agreement of July 30, 1996. In my December 23, 1998 opinion, I found that there is a triable issue of fact as to whether or not the 120-day restriction applies to the June 1996 loans. Walsh argues here that subsequent deposition testimony demonstrates that there is no genuine issue of material fact regarding whether the 120-day restriction applies retroactively to the June 1996 loans. However, I find that there is still a genuine issue of material fact regarding the retroactivity of the 120-day provision. Because the meaning of the contract in this instance is ambiguous, the court is permitted to consider extrinsic evidence to interpret the contractual language. That is *Kepner v. Tregoe, Inc. v. Vroom*, 186 F.3d 283,387 (2d Cir. 1999). The parties have submitted conflicting evidence regarding the retroactivity of this provision.

Thus, because there is a triable issue of fact regarding the retroactivity of this provision, it is necessary for the court to consider Walsh's second basis for seeking summary judgment on the appraisal variance loans.

I should say at this time that when I have been talking about "waiver," I have been talking about intentional waiver, which is a waiver where a plaintiff establishes a

clear manifestation of intent by defendant to relinquish the protection of the relevant contractual provision. That is from *Gilbert Frank*. But there are two types of waiver under New York law, and the second is waiver by estoppel, where a plaintiff establishes that defendant by its conduct otherwise lulled plaintiff into sleeping on its rights. That behavior by estoppel is not an issue in this case, but I thought I should say that because the alleged waiver occurred subsequent to the expiration of the limitations period making it impossible for plaintiff to have detrimentally relied upon Walsh's conduct. That is directly from *Gilbert Frank*.

Now let's turn to the "as of" provision, which is the 120-day provision.

Section VI of the agreement provides that any reappraisal is required to be "as of the date of the seller's appraisal." In my December 1998 opinion, I dismissed 69 other appraisal variance claims because the reappraisals were not "as of" the date of the original appraisal and subsequently denied plaintiff's motion for reconsideration on this issue. It is undisputed that Cityscape's reappraisals for the 39 loans at issue in this case were not "as of" the date of the original appraisal. Walsh argues that Cityscape's failure discharges Walsh's obligation to repurchase the loans. Cityscape argues, however, that Walsh waived the "as of" requirement and that new evidence raises genuine issues of

material fact regarding Walsh's waiver of its right to invoke the "as of" provision.

Mr. Cohn of Walsh does not dispute that he was aware of this provision when he received the reappraisals. Moreover, he testified that he did not even look at the dates of the appraisals when he received them. Otherwise, the factual allegations regarding the waiver of the "as of" provision are substantially the same as the allegations regarding the waiver of the 120-day provision.

Defendant's silence regarding the date of the reappraisals does not provide a strong enough inference of intent to waive this provision to survive summary judgment. The allegation that Cohn contacted Cityscape as late as September 24 for third review appraisals might indicate that Walsh was considering foregoing the protection of this provision, but provides little support for the argument that Walsh intended to relinquish its rights. Plaintiffs have offered no evidence that would support the contention that defendant intended to waive this provision or that it had accepted these reappraisals.

Therefore, Cityscape's claims regarding the remaining appraisal variance loans are dismissed.

Now we will turn to the New Jersey loans.

Cityscape has moved for partial summary judgment on the 32 New Jersey loans that were part of a fraudulent

land-flipping scheme. Pursuant to the master agreement, Walsh made the following representations and warranties for each of the loans sold to Cityscape:

V.B.3. All information set forth in any schedule of loans delivered is true and correct in all respects, and all other information furnished to buyer by seller with respect to the loan(s) purchased is true and correct in all material aspects as of the settlement date.

Section V.B.13. There are no violations of any applicable state or federal law or regulation. . .

Pursuant to Section VI(A) of the agreement, which provides a remedy for a breach of the two provisions I just set forth, that is, V.B.3 and V.B.13, states:

In addition to any rights or remedies the buyer has in this contract, if at any time there is a breach of any representation or warranty set forth herein by seller, which breach, in the reasonable judgment of the buyer, impairs the ability of the buyer to enforce the note or mortgage, (a "material breach"), then the buyer shall give timely notice to seller in writing, after which time seller shall have 90 days to cure, and if not cured the seller shall upon demand of the buyer and at the sole option and absolute discretion of the buyer, repurchase the affected loan. . .

Cityscape argues that Walsh made several false representations and breached several warranties regarding the New Jersey loans and that as a result Walsh was contractually obligated to repurchase the loans upon Cityscape's demand. The court finds in favor of Cityscape on the New Jersey loans as to liability.

Cityscape has submitted overwhelming evidence that the New Jersey loans were fraudulent. According to a report

regarding the existence of a fraudulent scheme underlying 32 New Jersey loans.

Walsh nonetheless contests its liability on these loans and has moved for summary judgment in its favor on the grounds that the plain language of the agreement does not require that Walsh repurchase the 32 New Jersey loans.

First, as stated above, Section VI(A) permits Cityscape to demand repurchase where there is a breach of representation or warranty which "in the reasonable judgment of [Cityscape] impairs the ability of buyer to enforce the note or mortgage (a 'material breach')." Walsh argues that the meaning of this provision is that Cityscape may only demand repurchase where Cityscape is unable to sue on the note or foreclose on the mortgage. Defendant points to the definition of "enforce" in Black's Law Dictionary, which is "to put into execution, to take effect; to make effective; as to enforce a particular law, or write, a judgment or the collection of a particular debt or fine, to compel obedience to." Black's Law Dictionary, 474 (7th ed. 1999). From this definition, Walsh argues that this provision meant that Cityscape had to have a reasonable judgment that it would not be able to sue on or foreclose on the loans in order to invoke its repurchasing rights.

However, a plain reading of the language of this unambiguous provision leads to a different interpretation.

The definition of impair -- also from Black's, at page 754 -- is "to diminish the value of (property or a property right)." This provision is plainly satisfied in situations in which the value of the loan or property is diminished. Indeed, the "material breach" explanatory parenthetical that follows this clause makes the meaning of the clause clear -- the clause provides that Cityscape may only demand repurchase where a breach of representation or warranty results in a diminishment in value of the loan, as opposed to a technical breach which does not affect the value of the loan.

Walsh's remaining arguments are easily disposed of.

Walsh contends that the representation in V.B.3 is inapplicable in this context. According to Walsh, this provision applies only to the schedule of loans delivered and not to the actual loan files and documents. This interpretation is contrary to the plain language of the provision which warrants that in addition to the loan schedule, "all other information furnished to buyer by seller with respect to the loan(s) purchased is true and correct in all material aspects as of the settlement date." It is not necessary to resort to extrinsic information.

In addition, Walsh presents evidence that Cityscape did know or should have known or suspected that the loans were based on fraudulent appraisals. This evidence is not relevant to the ultimate resolution of this case. Absent evidence to

the contrary, the agreement between Cityscape and Walsh did not require Cityscape to bring such information to Walsh's attention. Walsh's argument that Cityscape waived its ability to seek repurchase of these loans is without merit.

Finally, Walsh argues that Section V.B.13 was not intended to apply to the instant situation but rather it was intended to refer to laws which protect the borrower, in accordance with the examples provided in the representation. It is not necessary for this court to reach this question given that Section V.B.3 unambiguously covers the situation.

For the reasons set forth above, Walsh's motion for summary judgment on the appraisal variance loans is granted. Cityscape's partial motion for summary judgment on the New Jersey loans is granted as to liability. Because there are unresolved issues as to the extent of the loss and damages suffered, I am ordering that there be an inquest on damages insofar as the New Jersey loans are concerned.

That is my decision. I will enter an order saying, For the reasons set forth on the record today that Walsh's motion for summary judgment on appraisals is granted and Cityscape's partial motion for summary judgment on the New Jersey loans is granted as to liability and there will be an inquest on damages in regard to the New Jersey loans.

Now, how do the parties want to handle that inquest? From my standpoint, I am prepared to do it whenever you want.

Do you want to take some time to talk among yourselves, a few weeks to decide whether you want to go forward on that? Is there anything we need in preparing? It seems to me there isn't, but I want to get the views of the parties.

MS. MOORE: Your Honor, we would like you to schedule the inquest in relatively short order, because if you do that it will prompt the parties to speak with each other.

THE COURT: All right.

MS. MOORE: By that I mean a couple of weeks in order to wake up my witnesses and make sure I have everybody lined up.

THE COURT: All right.

What is the position of the defense?

MS. GNUDI: I would suggest that if there is going to be an inquest, which I assume is some type of a hearing?

THE COURT: Yes. I will take whatever facts the parties want to give me on damages. If the parties want to do it, I will certainly do it on papers instead of with witnesses. Anyone who wants to have witnesses, I see no reason not to have witnesses, if you prefer it, but similarly, sometimes, especially in this type of case, it often can be put in on papers. I will let you talk to each other about that.

MS. GNUDI: I would just like to have the opportunity to speak to the attorney who is primarily handling this. He

is not here today.

THE COURT: Why don't you do this: Talk to each other within the next week. A week from today send me either a joint submission as to how you want to proceed, or if you can't agree on that, separate submissions, but put it in writing a week from today and then we will proceed.

If we do have a factual hearing as opposed to submission of papers, I would think it could be done well inside of a day, and I can find a day sometime by the end of June or the first week of July.

Thank you.

(Adjourned)